NO. 18-DCR-0152

STATE OF TEXAS	§	**IN THE DISTRICT COURT**
	§	
vs.	§	**344TH JUDICIAL DISTRICT**
	§	
ZENA COLLINS STEPHENS	§	**CHAMBERS COUNTY, TEXAS**

SECOND MOTION TO QUASH AND EXCEPTION TO THE FORM OF THE FELONY INDICTMENT AND SUPPLEMENT TO PRETRIAL WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Zena Collins Stephens, Defendant, and brings this Second Motion to Quash and Exception to Form of the Indictment in violation of Article 27.09 of the Texas Code of Criminal Procedure, and in support thereof shows:

I. SUMMARY OF ARGUMENT

This motion incorporates by reference the First Amended Motion to Quash filed in this matter on January 9, 2019. This Second Motion to Quash and Exception to the Form of the Indictment points out unequivocally that in addition to venue being improper as to Count I, venue is also improper as to Counts II and III of the indictment[1] Counts II and III of the indictment allege violations of Title 15 of the Election Code.[2] The Election Code expressly requires that venue for **all** criminal violations of Title 15 is the County of the residence of the defendant unless the defendant is not a Texas resident, in which case venue is Travis County. Zena Stephens is a resident of Jefferson County and was a resident of Jefferson County at the time of the alleged violations in Counts II and III. The remaining analytical framework in this motion primarily tracks the analytical

[1] The First Amended Motion to Quash alleged among other things that improper venue as to *any* one count of the indictment was fatal to the entirety of the indictment because the allegations were brought in a single charging instrument.

[2] Title 15 of the Election Code encompasses Chapters 251-258 of the Election Code. The specific alleged violations are in Chapter 253.033 *See Ex.A* indictment of Zena Stephens.

framework set forth the in the First Amended Motion to Quash and simply applies it to Counts II and III of the indictment.

II. PROCEDURAL HISTORY

This matter is before this Honorable Court due to alleged criminal violations that arose during the 2016 Sheriffs race in Jefferson County, Texas.

The Government alleges that Sheriff Zena Stephens violated subsection 253.033 of the Texas Election Code by "accepting…cash contribution[s] exceeding $100" on or about May 23, 2016 and on or about September 27, 2016, which are Class A misdemeanors. The Government further alleged that Sheriff Zena Stephens violated subsection 37.10 of the Texas Penal Code by "tampering with a governmental record" on October 11, 2016, which is a state jail felony. The Attorney General's Office presented these charges to the Grand Jury of Chambers County, Texas. The offenses were alleged to have occurred in Jefferson County, Texas.

After presentment of the Attorney General's case, the Chambers County Grand Jury returned an Indictment for the above referenced offenses on April 26, 2018.

III. MOTION TO QUASH

The indictment charging Sheriff Zena Stephens with tampering with a governmental record and accepting a cash contribution exceeding $100.00 should be quashed, because it does not appear to be the "act of a proper grand jury" or to have been presented in the "proper court" as required by law, and it fails to meet all of the requisites prescribed by Article 21.02 of the Texas Code of Criminal Procedure.

The indictment does not comply with Article 27.09 of the Texas Code of Criminal Procedure, because the Grand Jury of Chambers County, Texas returned a true bill for an offense

alleged to have occurred in Jefferson County, Texas. The venue is improper and does not vest the court with personal jurisdiction over Sheriff Zena Stephens.

Venue for Count I is Jefferson County by virtue of Texas Code of Criminal Procedure §13.18, which provides that for penal code offenses where venue is not expressly stated, venue is in the County where the offense is alleged to have occurred.

Venue for Counts II and III is Jefferson County by virtue of Texas Election Code §251.004, which expressly provides "[v]enue for a criminal offense prescribed by this title is in the county of residence of the defendant, unless the defendant is not a Texas resident, in which case venue is in Travis County"[3]

There is no statute that provides that "election code offenses" may be prosecuted in an adjoining county. The attorney general has conflated its ability to prosecute alleged violations of election laws with an ability to select venue where alleged violations of election laws are prosecuted. The venue provision relied upon in Counts I, II, and III expressly limits its application to "an offense under this subchapter". However, proper venue for offenses found within the Texas Penal Code where venue is not specifically stated, is the county where the offense was committed[4].

Here, the felony charge of "Tampering with Governmental Record" is found under subsection 37.10 of the Texas Penal Code and the offense of receipt of a cash contribution is governed by Tex. Elec. Code §§ 253.003(b) and 253.033. Furthermore, Chambers County is not the proper venue for prosecution of the Penal Code offense, as the indictment alleged the offense to have occurred in Jefferson County.

[3] See eg Tex Elec Code § 251.004(a). Texas Codes and Statutes are generally broken into "Titles", "Chapters" and "Subchapters". A "Title" includes all chapters and subchapters within the "Title"
[4] Tex. Code Crim P. Art. 13.18.

IV. AUTHORITY & ARGUMENT

Exceptions to the form of an indictment may be taken when it does not appear to have been presented in the proper court as required by law, or the lack of any requisite prescribed by Article 21.02 of Texas Code of Criminal Procedure.[5] Subsection 21.02 requires that the indictment show on its face that it was an act of a grand jury of the proper county[6]. Furthermore, the indictment must show on its face that the place where the offense was committed is within the jurisdiction of the court in which the indictment is presented[7].

A. THE INDICTMENT IS INSUFFICIENT AS A MATTER OF LAW

Texas Code of Criminal Procedure, Article 21.02 clearly and unequivocally provides that "an indictment shall be deemed sufficient if it has the following requisites: (3) it must appear to be "the act of a grand jury of the proper county," and (5) it must show that the place where the offense was committed is within the jurisdiction of the Court. The indictment, returned by the Chambers County Grand Jury, reflects, on its face, that *all* of the alleged offenses occurred in Jefferson County.[8] Accordingly, the Chambers County Grand jury is not a "grand jury of the proper county" because not all of the offenses indicted can be prosecuted in an adjoining county.

There is no statutory provision which permits a charge of "tampering with a governmental record" to be prosecuted in an "adjoining county." Nor is there a statutory provision that permits prosecution of receipt of a cash contribution in an adjoining county. The Code of Criminal Procedure does recognize that in some instances, offenses may be prosecuted in other counties.[9] However, those offenses are enumerated in the Code of Criminal Procedure or in the enacting

[5] Tex. Code Crim. P. Art. 27.09.
[6] Tex. Code Crim. P. Art. 21.02(3).
[7] Tex. Code Crim. P. Art. 21.02(5).
[8] *See* Exhibit A
[9] Tex. Code Crim. P. Art. 21.06

provisions of the statute. In the absence of an express statutory provision, "the proper county" for the prosecution of offenses is that in which the offense was committed.[10] In fact, universally, Texas Courts have found that the theme in the Texas Code of Criminal Procedure's venue provisions tends toward fixing venue in a county that is sufficiently connected to the offense alleged.[11]

The Texas Court of Criminal Appeals has characterized Texas venue statutes as "a species of codified 'substantial contacts' jurisdiction."[12] The Court went on to explain that for venue to lie, "the defendant, his conduct, his victim, or the fruits of his crime must have some relationship to the prosecuting county."[13] The Austin Court of Appeals offered even more clarity when it reiterated the legislative purposes of the venue statutes:

> Venue statutes function to ensure that jurors have a natural interest in the case because it touched their community; to ensure that prosecutions are initiated in counties that have some factual connection to the case, thus minimizing inconvenience to parties and witnesses; to aid predictability in judicial caseloads, and to ***prevent forum-shopping by the State.*** (emphasis added).[14]

Proper venue for offenses found within the Texas Penal Code that are not specifically stated, is the county where the offense was committed.[15] It is necessary to the exercise of judicial authority[16]. For venue to lie, either the defendant, the defendant's conduct, the victim, or the fruits of the crime must have *some relationship to the prosecuting county*[17]. A state does not have the

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[10] Tex. Code Crim. P. Art. 13.18
[11] *See Murphy v. State*, 112 S.W.3d 592, 604 (Tex. Crim. App. 2003); *Soliz v. State*, 97 S.W.3d 137, 141 (Tex. Crim. App. 2003); *Dewalt v. State*, 307 S.W.3d 437, 460-61 (Tex. App.—Austin 2010, pet. ref'd); *Thompson v. State*, 244 S.W.3d 357, 366 (Tex. App. —Tyler 2006, pet. dism'd); *Lebleu v. State*, 192 S.W.3d 205, 212 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).
[12] *Soliz*, 97 S.W.3d at 141
[13] *Id.*
[14] *Dewalt*, 307 S.W.3d at 460
[15] Tex. Code Crim. P. Art. 13.18
[16] *Thomas v. State*, 699 S.W.2d 845, 854 (Tex. Crim. App. 1985
[17] *Wooten v. State*, 331 S.W.3d 22, 26 (Tex. App.— Amarillo 2010, pet. ref'd)(emphasis added).

right to try a defendant anywhere the State chooses[18]. Failure to prove venue in the county of prosecution constitutes reversible error[19]. So, the Attorney General's lack of prosecutorial authority notwithstanding, Counts I-III could only be brought in a single indictment in Jefferson County[20].

The "act of a grand jury of the proper county" language applies to the entirety of the indictment, not just a portion of it. In short, the indictment cannot "appear to be the act of a grand jury of the proper county" if it is not returned in a county that is "the proper county" for *all* of the offenses alleged. Thus, the resulting indictment is insufficient and must be dismissed.

V. ELECTION CODE OFFENSES REQUIRE ALLEGATION "KNOWINGLY VIOLATING THE ELECTION CODE"

Finally, the indictment fails to contain necessary language. In *Fogo v. State*, the Texas Court of Criminal Appeals addressed the vagueness of criminal statutes at issue here.[21] In *Fogo*, an attorney made a $750 cash contribution to a justice of peace. Through a motion to quash, the attorney challenged the constitutionality of Texas Election Code § 253.003(a), which addresses the criminality of making a political contribution. The applicable provision here is §253.003(b) which addresses criminality in accepting political contributions. Specifically, only criminalizing receipt of contributions that the person "knows to have been made in violation of this chapter". Here the indictment omits that "knowing that acceptance of the contribution" violated the Texas Election Code. It is this component of the statute which is essential to a criminal allegation. The omission of this statutorily required language also merits quashing the indictment[22].

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[18] *Cook v. Morrill*, 783 F.2d 593, 595-96 (5th Cir. 1986).
[19] *Sudds v. State*, 140 S.W.3d 813, 816 (Tex. App. – Houston 2004).
[20] A separately filed Pretrial Writ of Habeas Corpus addresses the prosecutorial authority of the Texas Attorney General
[21] *Fogo v. State*, 830 Sw2d 592 (Tex. Crim. 1991)
[22] Tex. Code Crim. P. Art. 21.03

WHEREFORE, PREMISES CONSIDERED, Sheriff Zena Collins Stephens prays that the Court quash the Indictment due to the defects of form outlined above, and discharge Zena Collins Stephens.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the attached of the attached Second Motion to Quash and Exception to Form of Felony Indictment and Supplement to Pretrial Writ of Habeas Corpus

/S/Russell Wilson II
Russell Wilson II